NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re T.B., a Person Coming Under the Juvenile Court Law. ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. M.L. et al., Defendants and Respondents; T.B., Appellant.	G040594 (consol. with G040741) (Super. Ct. No. DP013949) O P I N I O N
In re T.B., a Person Coming Under the Juvenile Court Law. ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. M.L. et al. Defendants and Respondents; T.C., Objector and Appellant.	

Appeals from orders of the Superior Court of Orange County, James P. Marion, Judge. Appeals dismissed as moot.

Nicole Kording, under appointment by the Court of Appeal, for Minor and Appellant T.B.

Niccol Williams, under appointment by the Court of Appeal, for Objector and Appellant T.C.

Donna P. Chirco, under appointment by the Court of Appeal, for Defendant and Respondent M.L.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Respondent K.B.

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* * *

T.B. (the child) filed a petition under Welfare and Institutions Code section 388,[1] requesting that the juvenile court divest the Orange County Social Services Agency of its discretion to place him in the paternal grandparents' home in Washington State, where M.L. (the father) lives. T.C. (the de facto parent) filed a brief in support of the petition. The juvenile court denied the petition without a hearing. The child and the de facto parent appeal, claiming the summary denial was an abuse of discretion because the petition made a prima facie showing of changed circumstances and the child's best interests. As we explain, subsequent events have rendered the appeals moot; accordingly, we dismiss.

[1] All statutory references are to the Welfare and Institutions Code.

FACTS

T.B. was detained at birth (August 2006) for a positive toxicology screen. He was declared a dependent of the juvenile court and, at the request of the mother's family, he was placed with T.C., who was ultimately granted de facto parent status. The mother was provided reunification services. The father, who lives in Washington State, was identified as a possible biological father in December 2006; his paternity test results were received in July 2007, and he was declared a presumed father in August 2007. By then, the Orange County Social Services Agency (SSA) was recommending termination of reunification services to the mother. No reunification plan was ordered for the father, but the juvenile court authorized funding for his participation in drug and alcohol testing and parenting classes. Both sets of grandparents wanted placement of the child. The de facto parent wanted to adopt him. The parents and grandparents became dissatisfied with the social worker, and tensions among the various interests escalated as the case progressed.

After repeated continuances, the juvenile court started the six-month review hearing on November 6, 2007. By that time, it was also the 12-month review hearing. The hearing dragged on until February 11, 2008. The court found it could not return the child to either parent, but that the parents did not receive reasonable services. Accordingly, the court ordered the father to participate in an alcohol abuse program for six months and ordered six more months of services for the mother. It also summarily denied a section 388 petition by the maternal grandmother seeking placement of the child with her. The father, the child, SSA, and the maternal grandmother all appealed from the orders.[2]

[2] In an opinion filed concurrently with this opinion, this court affirmed the orders made at the six- and 12-month review hearing and affirmed the summary denial of the section 388 petition. (*In re T.B.* (Mar. 30, 2009, G040104) [nonpub. opn.].)

In March 2008, a new social worker, April Wright-Herrera, was assigned to the child's case. A new 18-month review hearing was set for August 4, 2008. Wright-Herrera arranged for the father to test for drug and alcohol use in Washington and made contact with the social worker there who handled the reports under the Interstate Compact for the Placement of Children (ICPC). The father began attending Narcotics Anonymous/Alcoholics Anonymous (NA/AA) meetings, and his random drug tests were negative. He was allowed extended overnight visits with the child when he came to Orange County, which he was able to do about once a month for several days each time. The mother's drug test results were negative except for several missed tests in April, which were considered positive. Her visits with the child went well, but she missed several visits in April and May. She also missed appointments with Wright-Herrera during April and May, had not entered a substance abuse program, and had not verified her attendance at NA/AA meetings.

In May, the state of Washington completed the ICPC home study and agreed to supervise the child in the home of the paternal grandparents, where the father also lived. On May 14, the father filed a section 388 petition asking for an order placing the minor with him or, alternatively, placing the child with the paternal grandparents and allowing the father to live in the home without being the sole caretaker until he completed his programs. On the same date, the maternal grandmother filed a section 388 petition asking that the child be removed from the de facto parent's home and placed with her or some other family member. The court granted a hearing on the father's petition; it denied a hearing on the maternal grandmother's petition.

In June, Wright-Herrera reported she had received the ICPC home study recommending placement in the paternal grandparents' home. The father was participating in a substance abuse program and was expected to complete it in August or September 2008. All his drug tests were negative. In response to the father's section 388 petition, Wright-Herrera did not want to place the child with the father "until he has

successfully completed the Substance Abuse Program and shown at least six months of no missed and/or positive drug test results." She recommended placing the child with the paternal grandparents; the father would be authorized to live there but not to be the sole caretaker of the minor. Wright-Herrera felt this arrangement would be beneficial to the child because it would strengthen the relationship between him and his father.

In response to the June 19 report, the child filed a section 388 petition asking the court "to vacate suitable placement authority in SSA pending a hearing on the issue of moving [the child] from his foster home of almost two years to place him with a paternal grandmother he has only met a few times." The section 388 petition alleged the child had "regressed since his relatively recent extended visits with his father." Attached to the petition was an unsigned list of negative behaviors (presumably prepared by the de facto parent) that the child exhibited after each day of visits with the father during extended visits in May and June. The de facto parent filed a brief in support of the section 388 petition, arguing that the court should maintain the status quo pending the outcome of the pending appeals.

Wright-Herrera filed an addendum report on June 25, stating, "According to the [de facto parent], the child has regressed since his relatively extended visits with his father. According to the child's parents, the child has adjusted well with the extended visits with his father and has not regressed." The social worker had monitored the child's visits with both the father and the mother and had not seen any problems.

On June 25, 2008, the court found the child's section 388 petition failed to make a prima facie case and denied it without a hearing. The court explained that it had "problems" with the child's placement with the de facto parent. "[T]here are issues with [the de facto parent]. And she's done everything to make this case go her way. And that was one of the reasons why it was unreasonable services [in the six- and 12-month review order] because that social worker who was the original social worker on this was the tail wagging the dog, and that was the reason I put that down. [¶] . . . [I]t's clear to

this court – I feel it from the bottom of my heart – [the father] did not have a chance to reconcile or have reasonable services because social worker in that case listened to everything [the de facto parent] said. [¶] I think she has credibility issues. Was it enough to take [the child] out of that placement? No. I didn't want to upset the apple cart at that point in time . . . ."

The court expressed its belief that the paternal grandmother was the best placement for the child. It found that the child would not suffer emotional damage if he were moved; rather, he would suffer such damage if he stayed with [the de facto parent]. "The longer he stays with [the de facto parent], there's going to be [a best interests] argument. We go past the 18-month review, there's going to be a stronger argument that the stability of [the child] demands he stay with [the de facto parent] regardless of the court's problems with that placement. . . . [¶] I think at this point in time that he's at risk based on the reports that I have in front of me. And I say that with the idea that she loves that little boy. But I think there's an emotional problem with her, and I saw her testify." The court denied the child's request for a stay pending an appeal of its ruling. It then began the hearing on the father's section 388 petition. The hearing was continued due to the court's vacation, and the father ultimately withdrew his petition on July 15.

Both the child and the de facto parent appealed the denial of the child's section 388 petition. The child also filed a petition for a writ of supersedeas seeking to stay his removal from his current placement pending the resolution of the appeal. This court issued an order on July 2, 2008, enjoining SSA from changing the child's current placement. The petition for writ of supersedeas is pending.

We take judicial notice of the following events that occurred subsequent to the date of the order from which the appeals are taken. (*In re Karen G.* (2004) 121 Cal.App.4th 1384, 1389-1390.) In July, Wright-Herrera said the father was participating in his program but still did not think he had an alcohol problem. Pictures of the father were posted on a MySpace site in June and July showing him in "drinking" situations.

He admitted being with friends who drink but denied drinking himself. The mother was trying to get into a substance abuse program but had not yet been successful. Her drug testing had yielded some negative results, a missed test and an invalid test. In August, the social worker recommended termination of services and referral to a .26 hearing. She also recommended a 60-day trial visit with the father.

On August 11, the social worker was changed to Scott Sweaza. He observed: "Unfortunately, the relationships between the parties involved and extended family members have deteriorated over time. This has resulted in a severe lack of communication between adults, false accusations, misunderstandings, destruction of trust, and a complete disservice to [the child]." Sweaza took firm command of the situation and apparently was successful in getting the parties to treat each other civilly and communicate their concerns directly to him rather than to each other. The mother continued to work her programs, although she still missed tests now and then. Sweaza was concerned that the father failed to complete a breath analysis on July 14 and failed to show up for testing on August 12, 2008. He "continued[d] to have concerns related to the father's [lack of] acknowledgement of his alcoholism, and participation in his case plan." As of September 8, 2008, the father had not contacted Tristan for over three weeks.

The 18-month review hearing was continued repeatedly. On October 16, 2008, SSA filed a request with this court to lift the temporary stay so it could place the child with the mother for a 60-day "trial release," starting around November 2. SSA explained that circumstances had changed and the trial release would be in the child's best interest. The mother had been substance free since March 2008 and had complied with her case plan. SSA also explained that it no longer thought the de facto parent was a good placement because she was not cooperating with the reunification services to the parents. SSA also asserted it was no longer interested in moving the child to the state of Washington, so the stay was no longer necessary.

Sweaza submitted a declaration in support of SSA's request to lift the stay, dated October 16, 2008. He concluded that the child needed to be removed from the de facto parent's home as soon as possible because she would not cooperate with reunification services, she was requiring that [the child] call her "Mommy," and she expressed her belief that God wanted the child placed with her. Sweaza also concluded that the mother had completed the requirements of her case plan. She continued to attend a drug treatment program and, he stated, "Mother has tested consistently twice a week since March 2008 without any positive or missed tests. Her tests have been free of any illegal drugs or alcohol, including methadone. Since April 2008, signature cards indicate that mother has been attending AA consistently at least twice a week." The mother had three weekend visits with the child in the maternal grandmother's home, which went well. At a team meeting on October 14, 2008, in which the father participated by telephone, it was decided to implement the trial release to the mother. The father was not opposed.

This court issued the following order on October 23, 2008: "The temporary stay issued by this court on July 2, 2008 is LIFTED for the limited purpose of a 60-day trial visit with the mother, K.B. The trial visit shall not be construed as a change in placement."

SSA's report filed on November 19, 2008 stated that the child was returned to the mother for a 60-trial visit on November 3. Tristan was doing very well, seemingly happy with the mother and showing no signs of distress. The two of them were scheduled to start interactive therapy on November 24. The mother was in the process of locating a larger apartment, and family preservation services were scheduled for her. The social worker noted the mother was complying with her probation, attending her perinatal program twice weekly as required, and continuing "to be compliant with Social Services drug testing requirements." However, the mother missed her random test for October 30, which the social worker brushed aside: "Due to [the mother's] more recent consistency

with testing and contacting the undersigned as required, there are no concerns at this time regarding the missed test."

On November 19, 2008, the court continued the 18-month review hearing to January 8, 2009 to allow the trial visit to be completed. This court issued a stay of that hearing pending the resolution of these appeals.

On March 11, 2009, SSA reported that the mother and child were doing well; their conjoint therapist was enthusiastic about their interaction and bonding. The therapist recommended that the child have no contact with T.C. because it would be confusing to him. The mother had violated her probation by failing to appear at a progress review hearing and was ordered into "the Drug Court program, which is an outpatient program consisting of individual and group session and drug testing." The mother had received a positive test for opiates, which she explained was a result of taking previously prescribed Vicodin for pain. The social worker recommends that the child remain with the mother and that T.C.'s de facto status be withdrawn.[3]

DISCUSSION

Section 388 allows a parent to petition the juvenile court to change or modify a previous order "upon grounds of change of circumstance or new evidence." (§ 388, subd. (a).) The court must hold a hearing on the petition only "[i]f it appears that the best interests of the child may be promoted by the proposed change of order. . . ." (§ 388, subd. (c).) Thus, the petition must state a prima facie case of both changed circumstances and best interests of the child. "The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would

[3] T.C. and the child have asked this court to revoke the limited lift of the temporary stay preventing SSA from changing the child's placement and to order the child returned to T.C. They argue this is necessary because the information in the March 11, 2009 SSA report indicates the trial placement with the mother has failed. We decline to grant their request.

sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

Although the petition should be liberally construed in favor of granting a hearing (*In re Mary G.* (2007) 151 Cal.App.4th 184, 205), the juvenile court need not put blinders on when determining whether the required showing has been made. Rather, the court can consider the "entire factual and procedural history of the case" when evaluating the significance and strength of the allegations in the petition. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.) We review the juvenile court's decision to deny a hearing for an abuse of discretion. (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445.)

The juvenile court did not abuse its discretion in finding that the petition failed to state a prima facie case. The child's negative behaviors following visits with the father, as reported by the de facto parent, were incidents of clinginess, crankiness, and aggression. These behaviors by a two-year-old are not significant when considered in the context of the extended visits with the father; rather, they are understandable as a reaction to change and disruption in routine. Furthermore, the de facto parent had a history in this case of compiling lists of problems with any of the family members who tried to establish a relationship with the minor. These allegations were often refuted upon further investigation, and these specific allegations were contradicted in the social worker's report. The juvenile court had "credibility issues" with the de facto parent based on past events. It expressly disbelieved her and believed the father. The juvenile court was entitled to evaluate the petition in light of its credibility assessments formed throughout the life of the case.

However, we find that the appeal is moot due to the events occurring subsequent to the juvenile court's ruling on the child's section 388 petition. "An appeal is moot when as a result of changed circumstances the trial court on remand would be

unable to grant the relief sought by the appellant. [Citations.]" (*Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1226-1227.) The relief sought by the minor's petition was an order limiting SSA's discretion to place the child in the paternal grandparents' home without a hearing under the circumstances at that time, i.e., the child had been placed with the de facto parent for his entire life, the father was progressing on his case plan and had several successful extended visits with the child, and the mother was out of compliance with her case plan. True, if the trial placement with the mother fails, SSA may exercise its discretion to place the child with the paternal grandparents in the future. But the circumstances will be different from those that existed when the child's section 388 petition was considered. If a party disagrees with any future actions by SSA, a new section 388 petition will be necessary.

DISPOSITION

The appeals are dismissed as moot. The temporary stay restricting SSA's discretion to change the child's placement is lifted. The petition for writ of supersedeas is denied as moot.

SILLS, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.